(v) ***Additional Termination Event***. If any "Additional Termination Event" is specified in the Schedule or any Confirmation as applying, the occurrence of such event (and, in such event, the Affected Party or Affected Parties shall be as specified for such Additional Termination Event in the Schedule or such Confirmation).

(c) ***Event of Default and Illegality***. If an event or circumstance which would otherwise constitute or give rise to an Event of Default also constitutes an Illegality, it will be treated as an Illegality and will not constitute an Event of Default.

Section 5(b)(v)

Section 5(b)(v) of the Agreement has been added so that parties may specify Additional Termination Events in Part 1(h) of the Schedule or any Confirmation and any Affected Party or Affected Parties for such Additional Termination Events.

It is assumed that where an Additional Termination Event arises, all Transactions will be Affected Transactions and the non-Affected Party will be entitled to terminate them. Many Additional Termination Events are credit related (e.g. rating agency downgrades of a party's outstanding long-term debt securities below a minimum rating or the cancellation of a rating by a credit ratings agency) and therefore impact the entire contractual relationship between the parties and not just a particular group of Transactions. A Change of Ownership clause and full or partial prepayment of a loan linked to a swap are other common examples of an Additional Termination Event.

Section 5(c)

Section 5(c) of the Agreement covers the position where an Event of Default can also be classified as an Illegality by providing that in those circumstances it will be treated as an Illegality. This is done to lessen the effect of the event by closing out only the Affected Transaction(s) rather than all Transactions as under an Event of Default. It protects a party unable to make a necessary payment because to do so would be unlawful but it does not defer the Scheduled Payment Date itself. Interest would accrue at the Default Rate from and including the Scheduled Payment Date to, but excluding the date on which any early termination notice is given for the Illegality if the parties cannot transfer the deal under Section 6(b)(ii) to avoid the Illegality.

Section 6 – Early Termination

Section 6 describes the detailed close-out netting mechanism where an Event of Default or Termination Event occurs.

Close-out netting is vital to the ISDA Master Agreement; so vital that ISDA has commissioned legal opinions from law firms in 54 countries to find out if they would recognise close-out netting if a Non-defaulting Party exercised its rights in a default or bankruptcy situation involving one of their nationals. The vast majority of jurisdictions do recognise the effectiveness of close-out netting although sometimes not all products are eligible for it and this would need checking in each case. A list of these opinions is shown in Annex 3, pages 783–784.

In order to minimise the capital allocated by banks to OTC derivatives' trading book risk exposure, regulators require written, reasoned, independent legal opinions from major law firms for each jurisdiction that close-out netting works where a bank is seeking to net its exposure in respect of Transactions under Agreements with various counterparties in that country. Regulators require these legal opinions to be updated at least once a year.

When relying on a netting or collateral opinion from ISDA you should ensure that your counterparty is a type of entity covered by the opinion. While these opinions typically cover corporates and banks, they do not always cover more specialised entities such as insurance companies, partnerships and government entities which may well be subject to separate insolvency regimes in the country concerned.

It is vital for a solvent party to have a clear and effective close-out mechanism so that it can replace the Terminated Transactions it had with an insolvent or defaulting counterparty as quickly as possible so as to maintain any underlying hedging transactions.

Before entering the tall grass and describing the Section 6 provisions in depth, I should first like to attempt a summary of them.

When an Event of Default occurs, only the Non-defaulting Party can choose an Early Termination Date and close out and net off all Transactions between the parties to reach a single figure payable one way or the other. This payment essentially represents cash damages for the Transactions terminated early. The Early Termination Date may be declared at any time that the Event of Default persists but it must be designated within 20 days of the termination notice.

Please note that if an Event of Default impacting a party is cured before a termination notice is given, the Non-defaulting Party loses its right to give such a notice because Section 6(a)(i) requires that the Event of Default is "continuing". However, once the notice is given, the Defaulting Party cannot then cure the Event of Default. This is because as soon as the Non-defaulting Party gives notice it must have certainty and be free to enter into a

replacement Transaction to cover the open position that will arise on the Early Termination Date or free to unwind an existing hedging Transaction without fear that a Defaulting Party performing its obligations late will mean the Non-defaulting Party will have to reverse its own actions possibly at a loss.

Therefore once an Early Termination Date has been declared there is no turning back. However, termination is not the only remedy of an innocent party as Section 9(d) provides the possibility for other remedies to be pursued as we shall see.

With a Termination Event (except for a Credit Event Upon Merger and probably Additional Termination Events) the parties have to find a way to keep any Affected Transaction alive possibly by transferring it to another office or group company. They have 20–30 days to do this, but if they fail, the Affected Transaction or Transactions are terminated.

Under the 1992 Agreement the payment measures are Market Quotation or Loss which each describes how termination payments are calculated.

Market Quotation involves the Non-defaulting Party obtaining close-out quotations from four major dealers (called Reference Market-makers) for the replacement cost of the Terminated Transactions (i.e. how much it would theoretically cost to step into the Non-defaulting Party's shoes). Under this measure the highest and lowest quotations are disregarded and the arithmetic mean of the two remaining quotations is taken to which are added any net Unpaid Amounts to produce the net termination payment (the Settlement Amount) owed to one party or the other (see the commentary for Section 6(e) pages 103–105).

Loss can be used as a fallback measure to Market Quotation where the Non-defaulting Party believes that using Market Quotation may not produce a commercially reasonable result. They may believe that Market Quotations could be distorted (e.g. many traders requesting termination figures in a major close-out situation like Barings in 1995 or Lehman Brothers in September 2008 where very few Market Quotations were available). In these circumstances dealers are also wary about disclosing the terms for a Defaulting Party whom the other dealer may also have as a counterparty and so may prefer the greater privacy of Loss.

Loss can also be used where a market is thin or not liquid, or because that is the norm for that market (e.g. the FX and currency option market). It may also be preferable for Transactions settling by physical delivery.

Under Loss the Non-defaulting Party makes its own good faith calculations as to what its losses and costs are (i.e. if it is "in the money") and the level of its gains if it is "out of the money". The losses and costs are expressed as positive numbers and the gains as negative numbers.

If the Non-defaulting Party is "in the money" its position is impaired because it will not receive any future payments from the Defaulting Party. If it is "out of the money" it will gain because it will not need to make

future payments to the Defaulting Party. The Non-defaulting Party can include hedging transaction unwind or breakage costs and funding costs in its calculation of Loss.

Section 11 expenses (e.g. legal fees and stamp duties) are excluded from the Loss figure and are accounted for separately.

Loss can include obtaining market quotations (see the last sentence of the Section 14 definition of Loss) which indicates that it is a broader measure than Market Quotation.

Calculations have to be made on the Early Termination Date or on the earliest date as soon as reasonably practicable thereafter.

Parties normally adopt one payment measure to apply to all Transactions documented under the Agreement but I regularly see Loss stated as applying to foreign exchange and currency option Transactions (the norm in those markets) and Market Quotation as applying to all other products under the same Agreement. The choice of payment measure is made in Part 1(f)(i) of the Schedule. Where no choice is made the ISDA fallback is Market Quotation.

The payment methods are the First Method or the Second Method. The choice is made in Part 1(f)(ii) of the Schedule. Where no choice is made the fallback is the Second Method.

The Non-defaulting Party makes the calculations and the payments due are netted off to produce a single figure payable one way or the other.

Under the First Method if the single net payment is due to the Defaulting Party they do not get it. The Non-defaulting Party keeps it as a windfall. Under the Second Method if the single net payment is due to the Defaulting Party, they would receive it.

The First Method is often referred to as "limited two-way payments" or a "walkaway clause" because the Non-defaulting Party can walk away from its obligations. This represents a punishment for the Defaulting Party.

However, financial regulators around the world forbid the use of the First Method where banks are seeking to have derivatives contracts recognised for netting for regulatory capital savings and large exposure purposes relating to counterparty risk. For banks the Second Method must always be used.

There is more about the calculation of termination payments in the commentary on Section 6(e), pages 103–105.

Thoroughly confused? Hopefully, Figures 3.3. and 3.4. will help. Figure 3.3. shows who has the right to terminate under the Section 5 events. Figure 3.4. illustrates the effect of termination on the Transactions involved.

Finally I should also like to say a few words about Automatic Early Termination.

Parties choose in Part 1(e) of the Schedule if "Automatic Early Termination" will apply to a party when certain bankruptcy or insolvency events occur. Where it applies and happens, an Early Termination Date will

Figure 3.3 Early termination: who can terminate

Reason	Who may terminate
Events of Default	
• Bankruptcy	• Non-defaulting Party or Automatic*
• Other	• Non-defaulting Party
Termination Event	
• Illegality	• either party
• Tax Event	• Affected Party
• Tax Event Upon Merger	• Burdened Party
• Credit Event Upon Merger	• non-Affected Party
• Additional Termination Event	• non-Affected Party or either party
	• (if there are two Affected Parties)

* only applies if selected in Schedule

Figure 3.4 Early termination: effect of termination

Event of Default	• all Transactions terminated
Credit Event Upon Merger	• all Transactions terminated
Additional Termination Event	• all Transactions terminated (presumably)
Other Termination Events	• only Affected Transactions terminated

arise automatically for all outstanding Transactions without notice to the Defaulting Party.

Quite possibly the Non-defaulting Party may be unaware of the bankruptcy event and when they find out markets may have moved significantly since the automatic or deemed Early Termination Date. This could result in hedging transactions having to be replaced at higher cost in the market.

In general, lawyers consider the drawbacks of Automatic Early Termination to outweigh its benefits. However, it is helpful to apply it to counterparties subject to certain insolvency regimes, e.g. Germany, Japan, the Netherlands and Switzerland, where the insolvency statutes could override the close-out netting terms in a contract like the ISDA Master Agreement. It is not necessary in the UK or the USA where termination by notice is effective and the timing is under your control as a Non-defaulting Party. This subject is discussed further in Chapters 5 and 8.

To mitigate the effects of Automatic Early Termination you sometimes see clauses in the Schedule which indemnify the Non-defaulting Party against movements in prices and rates from the automatic or deemed Early Termination Date until the Non-defaulting Party becomes aware of the insolvency event.

However, the value of such an indemnity is questionable because it is given by a bankrupt Defaulting Party!

Please note that Automatic Early Termination only applies to certain insolvency events and not to other types of Events of Default.

In the past some market players have been concerned that Automatic Early Termination might not be enforceable because it might cut across automatic stay bankruptcy proceedings. In many jurisdictions this issue has been resolved in Automatic Early Termination's favour but this point should always be checked if it is important for Automatic Early Termination to be fully effective.

We now review the individual sub-sections of Section 6.

6. Early Termination

(a) ***Right to Terminate Following Event of Default.*** If at any time an Event of Default with respect to a party (the "Defaulting Party") has occurred and is then continuing, the other party (the "Non-defaulting Party") may, by not more than 20 days notice to the Defaulting Party specifying the relevant Event of Default, designate a day not earlier than the day such notice is effective as an Early Termination Date in respect of all outstanding Transactions. If, however, "Automatic Early Termination" is specified in the Schedule as applying to a party, then an Early Termination Date in respect of all outstanding Transactions will occur immediately upon the occurrence with respect to such party of an Event of Default specified in Section 5(a)(vii)(1), (3), (5), (6) or, to the extent analogous thereto, (8), and as of the time immediately preceding the institution of the relevant proceeding or the presentation of the relevant petition upon the occurrence with respect to such party of an Event of Default specified in Section 5(a)(vii)(4) or, to the extent analogous thereto, (8).

Section 6

Section 6(a)

Where an Event of Default occurs and is continuing the Non-defaulting Party has the right (but not the obligation) to terminate all outstanding Transactions under the Agreement by giving the Defaulting Party not more than 20 days' notice of its intention to close out all Transactions on a certain date called the Early Termination Date.

The notice must describe the Event of Default and the Early Termination Date is normally much sooner than 20 days after the notice is given.

With certain insolvency events (as described in Section 5(a)(vii)) termination may be automatic rather than by notice. These insolvency events are:

(1) Dissolution (except in the case of a merger, amalgamation or consolidation); or

(3) A general arrangement, assignment or composition with creditors; or

(5) A winding-up resolution is passed (except again in the case of a merger, amalgamation or consolidation); or

(6) The appointment of an administrator or similar insolvency official over all or most of a party's assets.

In these four cases termination takes place immediately after they happen. However, with the insolvency Event of Default in Section 5(a)(vii)(4) (which is the starting of proceedings or the filing of a winding-up order which either results in a bankruptcy judgment or is not dismissed within 30 days) then the close-out is deemed to occur immediately before the proceedings start or the order is presented. However, whether before or after, the problem here is that the Non-defaulting Party may not be aware of the insolvency event and by the time it is the markets may have moved strongly against it because he will need to close out as at the automatic or deemed Early Termination Date.

(b) ***Right to Terminate Following Termination Event.***

(i) ***Notice.*** If a Termination Event occurs, an Affected Party will, promptly upon becoming aware of it, notify the other party, specifying the nature of that Termination Event and each Affected Transaction and will also give such other information about that Termination Event as the other party may reasonably require.

(ii) ***Transfer to Avoid Termination Event.*** If either an Illegality under Section 5(b)(i)(1) or a Tax Event occurs and there is only one Affected Party, or if a Tax Event Upon Merger occurs and the Burdened Party is the Affected Party, the Affected Party will, as a condition to its right to designate an Early Termination Date under Section 6(b)(iv), use all reasonable efforts (which will not require such party to incur a loss, excluding immaterial, incidental expenses) to transfer within 20 days after it gives notice under Section 6(b)(i) all its rights and obligations under this Agreement in respect of the Affected Transactions to another of its Offices or Affiliates so that such Termination Event ceases to exist.

If the Affected Party is not able to make such a transfer it will give notice to the other party to that effect within such 20 day period, whereupon the other party may effect such a transfer within 30 days after the notice is given under Section 6(b)(i).

Any such transfer by a party under this Section 6(b)(ii) will be subject to and conditional upon the prior written consent of the other party, which consent will not be withheld if such other party's policies in effect at such time would permit it to enter into transactions with the transferee on the terms proposed.

Section 6(b)

Section 6 (b) deals with termination rights following Termination Events.

Generally speaking, except for Credit Event Upon Merger and most Additional Termination Events, a non-Affected Party will only have the right to terminate individual Transactions afflicted by a Termination Event rather than all Transactions as under an Event of Default.

The process is as follows:

Notice

Under Section 6(b)(i), if a Termination Event occurs, an Affected Party must promptly inform and provide reasonable information to the other party of the particular Termination Event and each Affected Transaction.

Transfer to avoid Termination Event

However there is a duty by both parties to try to mitigate a Termination Event on the principle that it is better to continue a Transaction if you can. Consequently Section 6(b)(ii) of the Agreement requires an Affected Party impacted by one or more Termination Events first to use all reasonable efforts to transfer all Affected Transactions to another of its Offices or Affiliates (i.e. other group companies) to avoid the Termination Event concerned. The Affected Party is given a period of up to 20 days after notice to do this.

Where the Affected Party cannot make such a transfer, it must within the 20-day notice period notify the non-Affected Party who can try to do so within 30 days from the original notice date. So if the Affected Party tries to transfer and fails on the 20th day and then it notifies the non-Affected Party, the non-Affected Party only has ten more days in which to make a transfer.

The prior written consent of the other party is necessary to make this transfer but must not be unreasonably withheld especially if the non-Affected Party's policies would, in the normal course of business, allow it to enter into Transactions with this substitute Office or Affiliate of the Affected Party.

(iii) ***Two Affected Parties***. If an Illegality under Section 5(b)(i)(1) or a Tax Event occurs and there are two Affected Parties, each party will use all reasonable efforts to reach agreement within 30 days after notice thereof is given under Section 6(b)(i) on action to avoid that Termination Event.

(iv) ***Right to Terminate***. If: —

(1) a transfer under Section 6(b)(ii) or an agreement under Section 6(b)(iii), as the case may be, has not been effected with respect to all Affected Transactions within 30 days after an Affected Party gives notice under Section 6(b)(i); or

(2) an Illegality under Section 5(b)(i)(2), a Credit Event Upon Merger or an Additional Termination Event occurs, or a Tax Event Upon Merger occurs and the Burdened Party is not the Affected Party,

either party in the case of an Illegality, the Burdened Party in the case of a Tax Event Upon Merger, any Affected Party in the case of a Tax Event or an Additional Termination Event if there is more than one Affected Party, or the party which is not the Affected Party in the case of a Credit Event Upon Merger or an Additional Termination Event if there is only one Affected Party may, by not more than 20 days notice to the other party and provided that the relevant Termination Event is then continuing, designate a day not earlier than the day such notice is effective as an Early Termination Date in respect of all Affected Transactions.

(iii) Two Affected Parties

Where an Illegality under Section 5(b)(i)(1), i.e one involving the Master Agreement or a Tax Event under Section 5(b)(ii) has occurred, and there are two Affected Parties, they must both use all reasonable efforts to agree on action to avoid the relevant Termination Event within 30 days following notice.

(iv) Right to Terminate

If the parties are unable to agree to transfer or otherwise avoid the relevant Termination Event, an Early Termination Date may be declared in accordance with this Section 6(b)(iv).

Where a transfer fails to be made by either party in the 30-day period following the original notice in respect of a Termination Event, the Affected Party may choose an Early Termination Date (not earlier than the date the original notice became effective) in respect of all Affected Transactions. With Tax Event Upon Merger the Burdened Party has this right provided that it is not initiating the merger.

The Non-affected Party has this right in respect of Credit Event Upon Merger or Additional Termination Event provided that there is only one Affected Party, which there normally would be in these circumstances. Either party has this right with an Illegality.

For easy reference the rules here are as shown in Figure 3.3 on page 90.

(c) ***Effect of Designation.***

(i) If notice designating an Early Termination Date is given under Section 6(a) or (b), the Early Termination Date will occur on the date so designated, whether or not the relevant Event of Default or Termination Event is then continuing.

(ii) Upon the occurrence or effective designation of an Early Termination Date, no further payments or deliveries under Section 2(a)(i) or 2(e) in respect of the Terminated Transactions will be required to be made, but without prejudice to the other provisions of this Agreement. The amount, if any, payable in respect of an Early Termination Date shall be determined pursuant to Section 6(e).

Section 6(c)

(i) Where an Early Termination Date notice is given for an Event of Default or Termination Event, the Early Termination Date will occur on the chosen date whether or not the Event of Default or Termination Event is then continuing. The important thing is that the Event of Default happened not that it is continuing.

(ii) When an Early Termination Date happens or is chosen neither party is any longer required to make normal payments or deliveries under Sections 2(a)(i) or 2(e) of the Agreement for Transactions to be terminated. So effectively the Transactions themselves are discharged and an obligation to pay a termination payment takes their place.

The Agreement itself is not terminated by the giving of an early termination notice; only the parties' obligations to make payments or deliveries terminate. Several provisions (e.g. obligation to gross up payments (Section 2(d)(i)), obligation to make settlement payments under Section 6(e); currency conversion obligations (Section 8); and obligation to pay enforcement expenses (Section 11)) all survive because of Section 9(c) – Survival of Obligations. Payments or deliveries that would have been due on dates after the termination notice takes effect but on or before the Early Termination Date (as well as any obligations that did not become payable or deliverable because there was a failure to satisfy all conditions precedent – see Section 2(a)(iii)(3)) – are included in the definition of Unpaid Amounts (if Market Quotation applies) or within the Loss figure (if it applies), as the case may be, and are therefore included in the close-out calculation.

7. Transfer

Subject to Section 6(b)(ii) and to the extent permitted by applicable law, neither this Agreement nor any interest or obligation in or under this Agreement may be transferred (whether by way of security or otherwise) by either party without the prior written consent of the other party, except that:—

(a) a party may make such a transfer of this Agreement pursuant to a consolidation or amalgamation with, or merger with or into, or transfer of all or substantially all its assets to, another entity (but without prejudice to any other right or remedy under this Agreement); and

(b) a party may make such a transfer of all or any part of its interest in any Early Termination Amount payable to it by a Defaulting Party, together with any amounts payable on or with respect to that interest and any other rights associated with that interest pursuant to Sections 8, 9(h) and 11.

Any purported transfer that is not in compliance with this Section 7 will be void.

Section 7

Section 7 forbids either party to transfer the Agreement or any rights and obligations under it without prior written consent. However, there are three exceptions to this:

- If the purpose of a transfer is to avoid a Tax Event or Tax Event Upon Merger as per Section 6(b)(ii) consent may not be withheld if a party's normal business policies would permit it to deal with the proposed substitute Office or Affiliate on the proposed Transaction terms.
- Where a transfer of an Agreement arises from a merger or the transfer of all or most of a party's assets to another entity. The words in brackets indicate that other restrictions in the Agreement relating to mergers and similar transactions are in no way prejudiced by this exception, e.g. the Merger Without Assumption Event of Default which will not be extinguished because of Section 7(a)).
- If a Non-defaulting Party transfers its interest in any Early Termination Amount payable to it from a Defaulting Party under Section 6(e). This now includes any interest, foreign exchange conversion costs and Section 11 expenses.

Section 7 also makes clear that granting a security interest in respect of an Agreement constitutes a transfer and is prohibited to ensure that mutuality between the parties is present for the purposes of close-out netting. Close-out netting works on a principal-to-principal basis and any transfer of the Agreement to a third party would wreck that.

Any transfers not complying with the Section's terms will be void.

Before the collapse of Lehmans, it was becoming more common to see amendments to this transfer provision in the Schedule. These varied from general phrasing that consent to a transfer shall not be unreasonably withheld to blanket advance approvals of transfers to unspecified Affiliates upon an agreed notice period or with no notice at all. The pros and cons of these amendments are examined in Chapters 6 and 8.

Principal change from the 1992 Agreement

- The words "to the extent permitted by applicable law" added in line 1 of the preamble.
- In Section 7(b) interest, foreign exchange conversion costs and Section 11 expenses may be added on to the Early Termination Amount which a Non-defaulting Party desires to transfer.

8. Contractual Currency

(a) ***Payment in the Contractual Currency.*** Each payment under this Agreement will be made in the relevant currency specified in this Agreement for that payment (the "Contractual Currency"). To the extent permitted by applicable law, any obligation to make payments under this Agreement in the Contractual Currency will not be discharged or satisfied by any tender in any currency other than the Contractual Currency, except to the extent such tender results in the actual receipt by the party to which payment is owed, acting in good faith and using commercially reasonable procedures in converting the currency so tendered into the Contractual Currency, of the full amount in the Contractual Currency of all amounts payable in respect of this Agreement. If for any reason the amount in the Contractual Currency so received falls short of the amount in the Contractual Currency payable in respect of this Agreement, the party required to make the payment will, to the extent permitted by applicable law, immediately pay such additional amount in the Contractual Currency as may be necessary to compensate for the shortfall. If for any reason the amount in the Contractual Currency so received exceeds the amount in the Contractual Currency payable in respect of this Agreement, the party receiving the payment will refund promptly the amount of such excess.

(b) ***Judgments.*** To the extent permitted by applicable law, if any judgment or order expressed in a currency other than the Contractual Currency is rendered (i) for the payment of any amount owing in respect of this Agreement, (ii) for the payment of any amount relating to any early termination in respect of this Agreement or (iii) in respect of a judgment or order of another court for the payment of any amount described in clause (i) or (ii) above, the party seeking recovery, after recovery in full of the aggregate amount to which such party is entitled pursuant to the judgment or order, will be entitled to receive immediately from the other party the amount of any shortfall of the Contractual Currency received by such party as a consequence of sums paid in such other currency and will refund promptly to the other party any excess of the Contractual Currency received by such party as a consequence of sums paid in such other currency if such shortfall or such excess arises or results from any variation between the rate of exchange at which the Contractual Currency is converted into the currency of the judgment or order for the purpose of such judgment or order and the rate of exchange at which such party is able, acting in good faith and using commercially reasonable procedures in converting the currency received into the Contractual Currency, to purchase the Contractual Currency with the amount of the currency of the judgment or order actually received by such party.

Section 8

The Contractual Currency and judgment currency provisions here protect a party against foreign exchange losses.

Section 8(a)

Section 8(a) provides that all payments made in the normal course of business (i.e. where no Event of Default or Termination Event has intervened) must be made in the Contractual Currency agreed by the parties (normally in a Confirmation). Payments will not be discharged in a non-contractual currency unless the payee can convert it into the Contractual Currency. Where payments are made in another currency it must be converted into the Contractual Currency and any conversion shortfalls or surpluses must be paid to the party owed them. The party making the currency conversion calculations must act in good faith and use commercially reasonable procedures.

Section 8(b)

The same principle applies where this happens to payments under the Agreement due after legal proceedings where a recovering party has the right to convert an alternative currency into the Contractual Currency.

This is an example of a judgment currency clause and is necessary because courts in some jurisdictions will only make awards in their local currency which may well be different to the Contractual Currency.

Principal changes from the 1992 Agreement

- In both clauses currency conversion must be performed in good faith and using commercially reasonable procedures – the same standard required from a Determining Party in selecting the inputs for the calculation of Close-out Amount.
- In Section 8(b) the last sentence defining "rate of exchange" has been deleted.

(c) ***Separate Indemnities.*** To the extent permitted by applicable law, the indemnities in this Section 8 constitute separate and independent obligations from the other obligations in this Agreement, will be enforceable as separate and independent causes of action, will apply notwithstanding any indulgence granted by the party to which any payment is owed and will not be affected by judgment being obtained or claim or proof being made for any other sums payable in respect of this Agreement.

(d) ***Evidence of Loss.*** For the purpose of this Section 8, it will be sufficient for a party to demonstrate that it would have suffered a loss had an actual exchange or purchase been made.

Section 8(c)

This is rather technical. The provisions in Section 8(a) and (b) are described as separate and independent indemnities which are separately enforceable to avoid the risk that a court might combine a claim based on either indemnity with other claims being pursued for other sums under the Agreement. The indemnities will remain separate notwithstanding any indulgence or concessions granted by a creditor to his debtor or any judgment made or other claim being pursued for other sums payable under the Agreement

Section 8(d)

Section 8(d) states that it will be enough for a party to show that it would have suffered a loss had an actual exchange or purchase of currency been made.

Principal changes from the 1992 Agreement

- Section 8(c) – Minor clarifying wording.
- Section 8(d) – None.

9. Miscellaneous

(a) ***Entire Agreement.*** This Agreement constitutes the entire agreement and understanding of the parties with respect to its subject matter. Each of the parties acknowledges that in entering into this Agreement it has not relied on any oral or written representation, warranty or other assurance (except as provided for or referred to in this Agreement) and waives all rights and remedies which might otherwise be available to it in respect thereof, except that nothing in this Agreement will limit or exclude any liability of a party for fraud.

(b) ***Amendments.*** An amendment, modification or waiver in respect of this Agreement will only be effective if in writing (including a writing evidenced by a facsimile transmission) and executed by each of the parties or confirmed by an exchange of telexes or by an exchange of electronic messages on an electronic messaging system.

(c) ***Survival of Obligations.*** Without prejudice to Sections 2(a)(iii) and 6(c)(ii), the obligations of the parties under this Agreement will survive the termination of any Transaction.

(d) ***Remedies Cumulative.*** Except as provided in this Agreement, the rights, powers, remedies and privileges provided in this Agreement are cumulative and not exclusive of any rights, powers, remedies and privileges provided by law.

Section 9

Section 9(a)

The Agreement is stated as forming the entire agreement between the parties. Each party acknowledges that it has not relied upon oral or written representations from the other (unless already present in the Agreement) and waives all rights it could otherwise invoke. However, nothing in the Agreement excludes a party from liability for fraud.

Section 9(b)

Amendments (communicated by a variety of traditional means) are only effective if in writing and executed by both parties. Alternatively this can take place through the exchange of telexes or electronic messages. This does not include emails. Emails are specifically excluded in the definitions of "electronic messages" and "electronic messaging system" in the 2002 Agreement in Section 14. However, I do not consider this to be a hardship: it is better to have an amendment to an ISDA Master Agreement signed by authorised signatories of the contracting parties rather than for terms to be amended through an exchange of emails which could entail potential or actual security risks.

Section 9(c)

Transactions continue to their maturity under the Agreement unless they are subject to early termination.

Section 9(d)

It should be remembered that termination is not the sole remedy of a Non-defaulting Party. It also has the options of ignoring an Event of Default or Termination Event on one occasion if more important commercial reasons are present.

The Non-defaulting Party might also try to seek specific performance of its counterparty's obligations in the English courts where monetary compensation under Section 6(e) is not sufficient, e.g. where physical delivery of a share or commodity is required in a series of Transactions which were only entered into for that purpose. However, while it would have the right to try it would be unlikely to succeed because in recent cases judges have refused to rewrite the terms of the ISDA Master Agreement and cash damages are the norm in terminations under it.

(e) ***Counterparts and Confirmations.***

(i) This Agreement (and each amendment, modification and waiver in respect of it) may be executed and delivered in counterparts (including by facsimile transmission and by electronic messaging system), each of which will be deemed an original.

(ii) The parties intend that they are legally bound by the terms of each Transaction from the moment they agree to those terms (whether orally or otherwise). A Confirmation will be entered into as soon as practicable and may be executed and delivered in counterparts (including by facsimile transmission) or be created by an exchange of telexes, by an exchange of electronic messages on an electronic messaging system or by an exchange of e-mails, which in each case will be sufficient for all purposes to evidence a binding supplement to this Agreement. The parties will specify therein or through another effective means that any such counterpart, telex, electronic message or e-mail constitutes a Confirmation.

(f) ***No Waiver of Rights.*** A failure or delay in exercising any right, power or privilege in respect of this Agreement will not be presumed to operate as a waiver, and a single or partial exercise of any right, power or privilege will not be presumed to preclude any subsequent or further exercise, of that right, power or privilege or the exercise of any other right, power or privilege.

(g) ***Headings.*** The headings used in this Agreement are for convenience of reference only and are not to affect the construction of or to be taken into consideration in interpreting this Agreement.

Section 9(e)

(i) Parties may execute and deliver in counterparts an Agreement, amendment, modification and waiver and transmit the same by fax or electronic messaging system. Each document will be regarded as an original.

(ii) Parties are legally bound by the terms of each Transaction from the moment they agree to them (on the telephone or otherwise). A Confirmation must be entered into as soon as possible and may be executed in counterparts using traditional or electronic means of communication. Deals may now be confirmed by an exchange of emails but you would need to check that this is not prohibited by any statute of frauds or other legal regulation in your jurisdiction.

Section 9(f)

Variations of this standard provision are also commonly seen in loan agreements. No precedent is set for the future if a full or partial waiver is exercised in respect of any right, power or privilege under the Agreement.

Section 9(g)

Headings in the Agreement are for convenience only and are not to affect its interpretation.

Principal changes from the 1992 Agreement

- Section 9(a) – Addition of acknowledgment that neither party has relied on any oral or written representation, warranty or other assurance except as provided in the Agreement. Neither party can exclude liability from fraud from the Agreement.
- Section 9(b) – Minor changes.
- Section 9(e)(i) – Addition of electronic messaging systems for executing and delivering the 2002 Agreement or any amendments.
- Section 9(e)(ii) – Confirmations may now be executed by an exchange of emails.

Chapter 1 briefly described some of the functions of an Operations Department, but let us now review the elements of the 1992 and 2002 Agreements impacted by operational issues.

CONFIRMATIONS

The Confirmation makes its first appearance in the preamble on page 1 of both Agreements where it is described, with the Schedule, as included in the relevant Agreement.

In Section 1(b), the Confirmation has supremacy over the relevant Agreement where there is any conflict or inconsistency involving specific Transactions. It is therefore vital that the terms of the Confirmation are correctly drafted because they will prevail, unless otherwise agreed in the Schedule (which is rare) in respect of individual Transactions.

In Section 1(c), the Confirmations are one of the elements forming the single agreement designed to stop liquidators cherry picking.

In Section 2(a)(i), parties are obliged to make each payment or delivery stated in the Confirmation. This is expanded upon in Section 2(a)(ii) which states that payments will be made promptly on their due date in the recipient's jurisdiction as specified in the Confirmation. As regards deliveries, these will be made on the due date in the customary manner unless the Confirmation states otherwise. The Confirmation is very much tailored to the requirements of the particular deal.

In Part 2(c) payment netting across more than one Transaction in the same currency and for the same value date may be chosen in the Confirmation although it is more likely the election will be made in Part 4(i) of the Schedule.

In the preamble to Section 3 in the 2002 Agreement it is possible for Additional Representations to be specified in a Confirmation as an alternative to Part 4(m) of the Schedule.

Sections 4(a)(i) and (ii) of both Agreements state that tax or other required documentation may be specified in a Confirmation although it is more usual to do this in Part 3(a) of the Schedule.

Section 5(a)(ii)(2) of the 2002 Agreement concerns Repudiation of Agreement and includes that if a party repudiates a Confirmation this constitutes an Event of Default without any grace period.

In Sections 5(b)(i) and (ii) of the 2002 Agreement the calling of an Illegality or Force Majeure Event Termination Event will follow giving effect to any disruption fallback or remedy allowed in an ISDA Definitions booklet or in a Confirmation.

In Section 8 of both Agreements the Contractual Currency in which payments will be made under the Agreement will be part of the economic terms of the Confirmation.

Section 9(e)(ii) states that a Confirmation will be entered into as soon as possible after the oral telephone contract for the deal. A Confirmation can be a single document signed by both parties or two identical documents (called counterparts) signed by each party and which they would normally fax to each other. Together they constitute a fully signed Confirmation. The use of telexes (where still used) or electronic messaging systems can also create a legally binding Confirmation and with the 2002 Agreement email can also be used to confirm Transactions.

In Section 9(h)(i)(2) of the 2002 Agreement compensation for defaulted deliveries will be calculated in accordance with the Confirmation terms. The same applies to deferred deliveries under Section 9(h)(i)(4).

Section 10(c) of the 2002 Agreement deals with a multibranch situation where there is a requirement that payments through a party's Offices (branches) need to be specified in the Confirmation. Where this is not done the fallback in the 2002 Agreement (but not in the 1992 Agreement) will be the party's head or home Office.

The Confirmation will state who is Calculation Agent but this can also be specified in Part 4(e) of the Schedule.

PAYMENTS

Clearly payments and deliveries are very important under both the Confirmation and the Agreement itself.

Sub-sections 2(a)(i) and (ii) have already been referred to in connection with Confirmations. Section 2(a)(iii) states that normal payments or deliveries could be suspended under the Agreement if the Non-defaulting Party so chooses if:

- an Event of Default or a Potential Event of Default (which would become an Event of Default if notice is given by the Non-defaulting Party) occurs or continues; or
- an Early Termination Date for close-out of one, some or all Transactions has been designated by the Non-defaulting Party; or
- some other condition precedent in the Agreement (e.g. provision of credit support or a legal opinion) is unfulfilled.

If the Non-defaulting Party decides to act on any of these events all payments and deliveries are suspended and the parties could move into a close-out situation under Section 6(c).

In Section 2(b) a party may give five Local Business Days' notice to change its account for receiving payments or deliveries provided the other party does not reasonably object. It might do this if such a change

of account is to an overseas Office of the first party and a withholding tax charge might arise. It might also object to an overseas transfer of account if there was a risk of exchange controls being imposed on payments from that account.

Payment or settlement netting first appears in Section 2(c). It is designed to reduce settlement risk by avoiding the need for gross payments to flow in opposite directions under the same Transaction between the two parties in the same currency and on the same value date. That obligation is replaced by another under which payments are offset or netted against each other and the party owing the most pays the difference between the two amounts to its counterparty.

The basic position in Section 2(c) of the 1992 Agreement is single Transaction payment netting where payments or deliveries are netted in respect of the same Transaction, value date and currency. These conditions need not apply if parties so choose in Part 4(i) of the Schedule. That would allow payments under more than one Transaction of the same type (e.g. interest rate swaps) to be netted or even for payments due in the same currency and on the same value dates but for different products to be netted.

In the 2002 Agreement the starting point in Section 2(c) and Part 4(i) of the Schedule is Multiple Transaction Payment Netting. Can you do it or not?

However, in either case, it is vital that parties only commit to what they can actually do operationally.

There was a tendency in the past in Part 4(i) of the Schedule to the 1992 Agreement for parties to agree to multiple Transaction or cross-product payment netting whether or not they had systems to cope with this. They did this in the hope that one day they would develop such systems and would not need to amend the Schedule. Clearly the sophistication of parties' systems develops at different speeds and it would be embarrassing if one party developed a state of the art payment netting system and then called the other's bluff by insisting on cross-product netting, because of a commitment made in Part 4(i) of the Schedule.

Many banks have adopted a more critical approach to their payment netting capabilities by agreeing to single Transaction payment netting for most products but stating that multiple Transaction payment netting will apply to FX Transactions or Currency Options (the norm in those markets).

The scope of payment netting can therefore impact upon certain groups of Transactions and also in respect of the parties' individual pairs of Offices.

There is less scope for netting for deliveries of physical securities or commodities which is why I have focused on payment netting. However, it is possible on some occasions.

The position with payments afflicted by withholding tax as described in Section 2(d) has already been discussed at pages 183–185.

Section 2(e) in the 1992 Agreement deals with the question of default interest which is incurred following late payments of amounts due. Default interest is payable at the Default Rate (i.e. 1% over the Non-defaulting Party's cost of funds) from and including the date the payment was actually due to but excluding the date it is actually made. This is for payments made in the normal course of business.

Section 10(b) of the 1992 Agreement prevents a party from changing the Office through which it makes and receives payments or deliveries without the other party's written consent beforehand in order to avoid, among other things, possible unfavourable tax consequences for the other party.

The compensation mechanism for late deliveries needs to be stated in the Confirmation for the deal as far as the 1992 Agreement is concerned.

In the 2002 Agreement interest or compensation for late payments or deliveries is extensively treated in Section 9(h), a sub-section which accounts for about 7% of the Agreement's main text.

Payments or deliveries are also suspended during Waiting Periods for an Illegality or Force Majeure Event (see Section 5(d) of the 2002 Agreement).

DELIVERIES

It is worth stressing that while the 1992 Agreement provides a detailed description of payment obligations it is more "woolly" on delivery obligations which are normally fleshed out in Confirmations for physically settled Transactions. For instance, it is important that the Confirmation has provisions for interest and/or damages for late delivery of securities or commodities (which the Non-defaulting Party may have pre-sold to a third party). As mentioned above, Section 9(h) of the 2002 Agreement now covers this comprehensively.

Matters relevant to physical deliveries which are not really covered by the 1992 Agreement itself include:

- delivery versus payment or what happens if this is not possible;
- treatment of partial deliveries;
- compensation for delivery failures (but see Section 9(h) of the 2002 Agreement);
- relevant grace periods (the 2002 Agreement provides for a one Local Delivery Day grace period);
- market disruption events;
- disruption fallbacks;
- failures in settlement systems;

- redefinition of Local Business Day in terms of exchange trading days (partially done in the 2002 Agreement for days when settlement systems are open for business within the definition of Local Delivery Day);
- who bears registration and settlement costs;
- automatic exercise with physically settled options;
- representation as to delivery being made with good title;
- possible inclusion of an Impossibility clause (a Force Majeure Event is in the 2002 Agreement);
- use of Loss as a payment measure in the 1992 Agreement (generally regarded as better for physical delivery);
- consideration of tax issues relating to physical delivery of assets.

Of course, some of these matters can be included in special additional Parts to the Agreement Schedule, e.g. a Part 7 on metals or other commodity products.

These matters are usually either expanded upon in Confirmations themselves or, more often, are dealt with by way of choices in Confirmations which refer to very detailed provisions in the relevant product Definitions based upon market practice.

EARLY TERMINATION OR CLOSE-OUT

This area has undergone substantial alteration in the 2002 Agreement (see Chapter 4 pages 267–268).

With close-out situations in Section 6 of the 1992 Agreement it would be normal for dealers to obtain Market Quotations and calculate the replacement value of Transactions to be terminated or to determine the amounts due under Loss. The same would apply with the calculation of Close-out Amount by a Determining Party using various inputs under the 2002 Agreement.

However, an Operations section or Middle Office function would normally be involved in checking the calculations. The Legal Department would usually compose and send notices stating the nature of the Event of Default and claiming the relevant termination payment from a Defaulting Party or advising such party of any net amount due to it. The Operations section would need to monitor receipt of such payment from the Defaulting Party or make any necessary close-out net payment to them after taking account of any possible set-off against any of the Defaulting Party's other assets or liabilities recorded in the Non-defaulting Party's books on amounts due from the Defaulting Party under other agreements.

The Operations section and the Legal Department would also work closely together to monitor the effects of any Illegality or Force Majeure Event which led to a suspension of payments or deliveries during a Waiting Period under the 2002 Agreement. The Operations Department and the dealers would gauge if they want to close out further Affected Transactions in these circumstances if the Affected Party chose only to close out some of them.

Section 8 of the Agreement would also involve an Operations section. In the normal course they would need to ensure that payments are received in the Contractual Currency of the Confirmation. Where any other currency is involved they would make any necessary currency conversion and claim any shortfall or pay over any surplus arising from the conversion.

While it is possible that a Non-defaulting Party's Operations section might be involved in the invoicing and collection of Section 11 expenses arising from the enforcement or protection of the Non-defaulting Party's rights under the Agreement or any Credit Support Document given by the Defaulting Party, this would probably be done by the Legal Department.

ADMINISTRATIVE MATTERS

These include:

- recording change of account details (Section 2(b));
- calculating default interest or compensation for late deliveries (Section 2(e) of the 1992 Agreement or Section 9(h) of the 2002 Agreement);
- paying relevant Stamp Tax (Section 4(e));
- giving notice under the Agreement including in relation to such matters as address changes and other changes to static data (Section 12). It is likely that the Legal Department will give any notices required in connection with Sections 5 and 6 of the Agreement.

(c) The ***"Cross Default"*** provisions of Section 5(a)(vi) will apply to Party A and will apply to Party B except that the following provision shall be inserted at the end of Section 5(a)(vi):

"provided, however, that an Event of Default shall not occur under either (1) or (2) above if the default, Event of Default or other similar event or condition referred to in (1) or the failure to pay referred to in (2) is a failure to pay caused by an error or omission of an administrative or operational nature and funds were available to such party to enable it to make the relevant payment when due and such payment is in fact made on or before the third Local Business Day following receipt of written notice from the other party of such failure to pay".

Part 1 (c) Cross Default

Cross Default provisions are common in many other financial agreements (including loan agreements) beyond the ISDA Master Agreement. The basic ISDA provision catches contractual term and payment defaults in relation to borrowed money in agreements between either of the parties to this Agreement or their Specified Entities or Credit Support Providers with any other third party. Such a default must exceed a defined Threshold Amount (which can be an absolute monetary figure or some other measure such as a small percentage of shareholders' equity, i.e. share capital plus distributable reserves).

An increasingly common amendment is for the parties to downgrade Cross Default to cross acceleration. This is achieved by the following amendment in Part 1 or Part 5 of the Schedule:

The following words are deleted from line 7 of Section 5(a)(vi):

, or becoming capable at such time of being declared,

This changes who is in the driving seat. Assume your counterparty is the Defaulting Party. With Cross Default a Non-defaulting Party's awareness of the existence of a default under a debt agreement by the Defaulting Party which is above your Agreement's Threshold Amount is enough to trigger close-out under your Agreement with your counterparty. However, with cross acceleration the lender defaulted against in the debt agreement actually has to accelerate the indebtedness and take action to terminate its debt agreement with your defaulting counterparty before you can do so under yours. In other words, your close-out rights are no longer available at the default awareness level but deferred to the wishes of a third-party lender. This would prevent you from striking a deal with your defaulting counterparty, e.g. it gives you collateral for not terminating Transactions under the Agreement.

This process is called a "downgrading" from Cross Default to cross acceleration because by accepting it parties are relinquishing their rights to take immediate action where they become aware of a Cross Default situation which exceeds the agreed Threshold Amount in their ISDA Master Agreement. Credit departments often have to decide whether or not to accept cross acceleration and will consider if their counterparty is a type where they are comfortable in deferring their termination rights. For instance, they would probably be more comfortable in agreeing cross acceleration with a major insurance company than with a hedge fund. However, I would say that it is only really justifiable if your counterparty applies it uniformly across all its Agreements (it may so if it is a substantial multi-banked company, for instance) and you have written confirmation from it or its legal advisers of this. Even so you would not want to apply it with very weak counterparties. Here is an example of such wording:

> Representation of Party B in relation to cross acceleration. Party B represents to Party A at all times from the date hereof until the termination of all Transactions under this Agreement that Party B has only entered into Agreements where Section 5(a)(vi) thereof is amended in the same manner as herein so that cross acceleration will apply to each party. If at any time this representation proves to be incorrect or misleading and Party B does enter into an ISDA Master Agreement with any party under which Section 5(a)(vi) "Cross Default" will apply to either party without amendment, then Party B agrees that it will enter into an agreement amending the terms of this Agreement so that Party A's position under this Agreement is no less favourable with regard to the application of Cross Default than that of the relevant third party with whom Party B has entered into an Agreement containing the aforesaid provision.

The problem here is how you monitor this? There is no central registry to which you might refer to see if cross acceleration applies. The best you can do is to ask your counterparty to confirm this in writing every six months, which they might find irksome. If, of course, you found that its representation was untrue, you would have the right to terminate all Transactions under the Agreement by virtue of the Misrepresentation Event of Default (Section 5(a)(iv)).

Accepting cross acceleration with a multi-banked counterparty where you are not the lead bank could involve you in a work out situation where the wishes of the lead bank or majority banks could outweigh your own preferences.

Cross acceleration is badly named. It does not speed things up. It slows them down.

Some banks which rigidly stick by Threshold Amounts measured by a percentage of shareholders' funds for Cross Default purposes may accept a monetary Threshold Amount if cross acceleration applies. This is because they believe they will never default themselves or if they do they will default in an aggregate amount well beyond the Threshold Amount and so any action against them would probably be stayed until a creditor steering group met and agreed a course of action. In such circumstances, all the bank's agreements would be in jeopardy and a number of interest groups would be jockeying for position and seeking not to make matters worse.

Where a swap hedges a loan and the loan agreement contains cross acceleration it is normal to mirror this in the Agreement so that there is no unnecessary clash of terms between the documents.

In Agreement negotiations you sometimes see sovereign counterparties seeking to disapply Cross Default to themselves but apply it to their counterparties. There is no real justification for this as history has proved that countries are not immune from default. If this becomes an issue it

may occasionally be possible to negotiate that Cross Default does not apply either way. Where Cross Default does not apply, Specified Indebtedness is not defined and Threshold Amount is also not applicable.

The Cross Default provision often has language, commonly called "carve-out" language, excluding payment delays caused by operational and administrative error with a three Local Business Day cure period after notice. Our Schedule example is quite common. This carve-out is often accepted in the market.

> Please remember that this administrative or operational error is occurring under a loan agreement and not under the ISDA Master Agreement. Therefore there is no need to align it to the one Local Business Day grace period following notice which is the standard duration under the Failure to Pay or Deliver Event of Default (Section 5(a)(i)). Where the Master Agreement is loan-linked it is important to ensure that the administrative or operational error carve-out grace period is identical with that in the loan agreement.

The most detailed version of this provision I have seen is as follows:

> (c) The *"Cross Default"* provisions of Section 5(a)(vi) of this Agreement (as amended in Part 5(*) of this Schedule) will apply to Party A and Party B but shall exclude any default that results solely from wire transfer difficulties or an error or omission of an administrative or operational nature, provided that (i) sufficient funds were available for such party to fulfil its obligations hereunder on the relevant date, (ii) no other Event of Default was or is subsisting at the time, (iii) such default does not subsist for more than three Local Business Days and (iv) no creditor under any agreement or instrument for Specified Indebtedness has become entitled to declare an Event of Default hereunder or as a consequence of such default.

Some German banks like to include the following language to amend the Cross Default provision:

> The Cross Default provisions of Section 5(a)(vi) will apply to both parties subject to amendment by adding at the end thereof the following words:
>
> and in either case the other party determines in good faith that it has reasonable grounds to conclude that the performance by the Defaulting Party of its financial obligations hereunder is endangered.

Similar wording may also be found in the European Master Agreement issued by the European Banking Federation in October 1999 and revised in 2004. The purpose is to add a little extra materiality (beyond the Threshold Amount) to the Cross Default provision. Not only must there be a technical default but there must also be a good faith determination that the Defaulting Party is in danger of not fulfilling its obligations, i.e. it is in serious trouble.

Where Transactions under the Agreement are specifically to hedge loans, you sometimes see an additional sub-section to Section 5(a)(vi) relating to the termination of a lender's commitments:

> Section 5(a)(vi) will be amended to include the following Section 5(a)(vi)(3):
>
> "or (3) a default or event of default in respect of such party, such Credit Support Provider or such Specified Entity (individually or collectively) which has resulted in termination of the commitment of any person or entity under any agreement to lend or advance or make available funds to such party (or any such Credit Support Provider or Specified Entity) in respect of an aggregate amount of not less than the Threshold Amount under such agreements or instruments."

Occasionally where Cross Default is not to apply to any agreement between the parties you might see the following:

> Party B warrants and undertakes to Party A that it has not entered and will not enter into any agreements for either raising debt or concluding interest rate currency swap transactions which contain a provision that the counterparty or Party B may terminate such agreement in the circumstances set out in Section 5(a)(vi) of this Agreement or in circumstances similar to those set out in Section 5(a)(vi) of this Agreement.

A small amendment which is sometimes made to Section 5(a)(vi) is the following:

> The words "or similar condition or event (however described)" in the third line of this provision are deleted.

This provides a little more clarity that debt defaults and events of default are the sole focus here.